

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-6027

77-6031

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 77-6027
Docket No. 77-6031

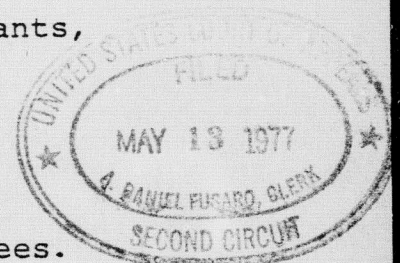
CAPITAL REGION CITIZENS COMMITTEE, et al.,

Plaintiffs-Appellants,

- against -

JOHN A. VOLPE, SECRETARY OF TRANSPORTATION
OF THE UNITED STATES, et al.,

Defendants-Appellees.



ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR NEW YORK STATE DEFENDANTS-APPELLEES

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Attorney for Defendants-Appellees

RUTH KESSLER TOCH
Solicitor General
DOUGLAS S. DALES, JR.
Assistant Attorney General

of Counsel

TABLE OF CONTENTS

	<u>Page</u>
PRELIMINARY STATEMENT	2
ISSUE PRESENTED	2
DECISION BELOW	3
STATEMENT OF THE CASE	4
ARGUMENT:	
POINT I. BASED UPON THE EVIDENCE BEFORE IT, THE DISTRICT COURT PROPERLY DISSOLVED ITS PRIOR INJUNCTION.	13
POINT II. BASED UPON THE EVIDENCE BEFORE IT, THE DISTRICT COURT PROPERLY GRANTED PARTIAL SUMMARY JUDGMENT TO DEFENDANTS.	28
CONCLUSION	31

CASES CITED

	<u>Page</u>
<u>Aberdeen & Rockfish R. Co. v. SCRAP,</u> 422 U.S. 289 1975)	18, 19
<u>Citizens to Preserve Overton Park v. Volpe,</u> 401 U.S. 402 (1971).	25
<u>Conservation Society of Southern Vermont, Inc. v.</u> <u>Secretary of Transportation, 531 F. 2d 637</u> (2nd Cir. 1976)	17, 19, 21
<u>Daly v. Volpe, 514 F. 2d 1106 (9th Cir. 1975)</u>	21
<u>Friends of the Earth v. Coleman, 513 F. 2d 295</u> (9th Cir. 1975)	21
<u>Kleppe v. Sierra Club,</u> 427, U.S. 390 (1976)	14, 16, 18, 19, 20, 29
<u>Lathan v. Brinegar, 506 F. 2d 677 (9th Cir. 1974).</u>	27
<u>Monroe County Conservation Council v. Volpe,</u> 472 F. 2d 693 (2nd Cir. 1972)	18, 26, 29, 30
<u>Natural Resources Defense Council, Inc. v. Callaway,</u> 524 F. 2d 79 (2nd Cir. 1975)	14, 19
<u>Natural Resources Defense Council, Inc. v. NRC,</u> 539 F. 2d 824 (2nd Cir. 1976)	19
<u>New York v. Kleppe, _____ U.S. _____,</u> 50 L. Ed. 2d 38 (1976)	14, 18
<u>New York v. NRC, _____ F. 2d _____,</u> 9 ERC 1825 (2nd Cir. February 14, 1977).	29
<u>Steubing v. Brinegar, 511 F. 2d 489</u> (2nd Cir. 1975)	12, 13

STATUTES, RULES AND REGULATIONS

	<u>Page</u>
Clean Air Act, 42 U.S.C. §§1857, et seq.	5, 9
Department of Transportation Act, 49 U.S.C. §§1651, et seq.	5, 9, 23
Federal Aid Highway Act, 23 U.S.C. §101, et seq. . .	5, 6, 9, 24
National Environmental Policy Act, 42 U.S.C. §§4321, et seq.	5, 9, 15, 17
Navigation and Navigable Waterways, 33 U.S.C.	5, 9
New York Constitution, Art. XIV	5
New York Environmental Conservation Law, §1-0101.	5
New York Transportation Law, §§14, 14-a	5
United States Constitution	5
Judiciary and Judicial Procedures, 28 U.S.C. §1292	.8, 11
FRCP, Rule 54	.4, 10
FRCP, Rule 56	28
Administrative Procedure Act, 5 U.S.C. §§706, et seq.	14
Pub. L. 94-83	17
23 C.F.R., Part 790	22

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 77-6027
Docket No. 77-6031

CAPITOL REGION CITIZENS COMMITTEE, THE RICHMONDVILLE
PROPERTY OWNERS COMMITTEE, NEW YORK STATE COALITION
FOR SANE TRANSPORTATION - N. Y. STATE COST, TOWN OF
ROTTERDAM, ST. FRANCIS COMMANDERY HALL ASSOCIATION, INC.,
a/k/a KNIGHTS OF ST. JOHN, JOHN W. KESEBERG, CHESTER
and JANE SNYDER, JOHN K. and MARY E. ALDERSHOFF and
GARRETT J. and DELLA M. ALDERSHOFF, WILLIAM F. and WILMA
SCHULTZE, ARTHUR W. and JANICE SCOTT, ROBERT G. and MARY
LOU SAWYER, and DANIEL T. and DORIS SEIF,

Plaintiffs-Appellants,

- against -

JOHN A. VOLPE, Secretary of Transportation of the United
States; GERALD D. LOVE, Regional Federal Highway Adminis-
trator of the Bureau of Roads, United States Department
of Transportation; ROBERT E. KIRBY, Division Engineer of
the Bureau of Roads, Federal Highway Administration, United
States Department of Transportation; THEODORE W. PARKER,
Commissioner of the Department of Transportation of the
State of New York; and CHARLES E. CARLSON, Regional Director,
New York State Department of Transportation, Region 1, And
each and every one of the foregoing individually as well
as in his designated official capacity,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR NEW YORK STATE DEFENDANTS-APPELLEES

PRELIMINARY STATEMENT

These are appeals by the plaintiffs^{1/} from an order of Honorable Edmund Port, Senior United States District Judge for the Northern District of New York, dated September 28, 1976, and filed in the Clerk's office September 29, 1976, which modified a previous order imposing preliminary injunction, dated November 14, 1973, by dissolving that prior preliminary injunction and granting partial summary judgment to the defendants. The November 14, 1973 injunction prohibited the federal defendants from granting PS&E approval to the State of New York, pending determination of the issues, and barred the use of federal funds for the project.

ISSUE PRESENTED

Did the District Court properly conclude, based on the papers before it, first, that the State and federal defendants were entitled to a dissolution of the Court's prior order prohibiting the grant of PS&E approval,^{2/} and second, that partial summary judgment in defendants' favor was warranted?

^{1/} Plaintiffs, Richmondville Property Owners Committee and New York State Coalition for Sane Transportation are represented by Attorney Hoppen; the remaining plaintiffs by Attorney Kafin. Each group of plaintiffs filed separate appeals.

^{2/} PS&E refers to approval of plans, specifications and estimates, a condition precedent to Federal financial participation, pursuant to 23 U.S.C. §106(a).

DECISION BELOW

The District Court, on motion of the State defendants in which the federal defendants joined, dissolved an outstanding preliminary injunction and granted partial summary judgment.

A decision (A527)^{3/} was dictated into the record upon completion of oral argument, setting forth a brief history of the litigation, Judge Port's reasoning and concluding "... that the defendants have now met the requirements which would permit the federal defendants to consider the grant of PS&E approval." The Order entered on this decision reads as follows:

"ORDERED, that the State defendants' motion herein be and the same hereby is granted; and it is further

"ORDERED, that the order dated November 14, 1973 be and it hereby is modified by eliminating therefrom the restraint on the grant of PS&E approval as to PINS 9357.08-.17 and 1357.01-.04 and that the injunction as to said PINS heretofore granted be and the same hereby is dissolved; and it is further

"ORDERED, that partial summary judgment be entered in favor of the defendants dismissing the complaint insofar as it concerns the above-mentioned PINS.

"The preliminary injunction is continued for a period of ten days from the date of entry of the order herein to permit the plaintiffs to file a notice of appeal and to apply to the Court of Appeals for a further stay."

3/ References are to pages of Joint Appendix.

STATEMENT OF THE CASE

A. THE PARTIES

Plaintiffs consist of fifteen individuals, three unincorporated associations, one incorporated fraternal organization and one municipal corporation (A5-A8). Class action status was alleged (A6), but no action was taken to obtain certification.

Defendants are the Federal Secretary of the Department of Transportation (DOT), the Regional Federal Highway Administrator of the Federal Highway Administration (FHWA), the Division Engineer of FHWA, the Commissioner of the New York State Department of Transportation and the Regional Director of NYDOT.

None of the named defendants presently hold the same office. Secretary John A. Volpe was replaced first by Claude S. Brinegar, then by William T. Coleman, Jr., who in turn was replaced by Brock Adams. FHWA Regional Administrator, Gerald D. Love, was replaced by Robert E. Kirby. The title of FHWA Division Engineer, held by Mr. Kirby, was changed to Division Administrator for New York, and is held by Victor E. Taylor. Theodore W. Parker was replaced by Raymond T. Schuler as Commissioner of NYDOT. Charles E. Carlson was replaced by Donald N. Geoffroy as Region 1 NYDOT Director.^{4/}

^{4/} FRCP Rule 54(d) provides for automatic substitution when public officers are sued in their official capacities. Though the defendants are named here individually, as well as officially, it is clear from the factual background that their acts could only be performed in their official capacities.

B. THE COMPLAINT

The litigation arises out of the proposed location, design and construction of Interstate Route 508, between Binghamton and Schenectady, known generally as I-88. Plaintiffs sought declaratory and injunctive relief based upon alleged violations of State and federal laws governing the environmental impact of highway construction.

The complaint contains nine purportedly separate causes of action and were described by Judge Port thusly:

"The various causes of action are asserted to arise out of violations of: The National Environmental Policy Act (42 U.S.C. §§4321 et seq.) (hereafter NEPA); the Federal Aid Highway Act (23 U.S.C. §§101 et seq.); the Department of Transportation Act (49 U.S.C. §§1651 et seq.); The Federal Clean Air Amendments of 1970 (42 U.S.C. §§1857 et seq.); portions of Title 33 of the United States Code relating to Navigation and Navigable Waterways; New York State Transportation Law §§14, 14-a (McKinney, 1973); New York Environmental Conservation Law §1-0101 (McKinney, 1973); New York State Constitution, Art. XIV, §4 (McKinney Supp, 1973); and the fifth, ninth and fourteenth amendments to the United States Constitution." (A281)

C. THE PROCEEDINGS TO DATE

Before the Court in 1973, and dealt with in a Memorandum-Decision and Order, dated November 14, 1973, were a motion for summary judgment, made by the State defendants on September 11, 1972, and by the federal defendants on November 27, 1972 (A2), and a motion by plaintiffs for preliminary injunction, filed September 26, 1973 (A2). Also involved was a motion on behalf of two contractors to intervene, which was denied.)

In that November 14, 1973 Order the Court dismissed the Sixth, Seventh and Eighth causes of action involving the State law allegations and Federal Constitutional claims, and preliminarily enjoined the grant of PS&E approval by the federal defendants and the disbursement of federal funds by all of the defendants.

The order listed three separate categories of project identification numbers (PINs) affected thusly:

"GROUP I

PIN 9357.18
 PIN 9357.05 5/
 PIN 9357.07 5/
 PINs 9357.08 through 9357.17
 PINs 1357.01 through 1357.04

These have not received PS&E approval.

"GROUP II

PIN 9357.00
 PIN 9357.01
 PIN 9357.20
 PIN 9357.19

These PINs have received PS&E approval and are under construction but have not had environmental impact statements filed.

5/ Between the submission of papers and the rendering of the decision, these PINs received PS&E approval. Accordingly, by Order filed December 27, 1973, these were deleted from Group I and added to Group III (A3).

"GROUP III

PIN 9357.02
PIN 9357.03
PIN 9357.28
PIN 9357.04
PIN 9357.06

These are PINs for which environmental impact statements were filed and which were not included in Group I or II above." (A299-A300)

These three groups were dealt with by Judge Port, as follows:

"INJUNCTIVE RELIEF

"As to the first group of projects mentioned the federal defendants should be enjoined preliminarily from granting P S and E approval.

As to the second group, restraining the receipt and disbursements of any further federal funds for work beyond the date of this order appears to me to be appropriate under all of the circumstances.

As to the third group of PINs I find that the projects were advanced and prosecuted on the obtaining of P S and E approvals after the filing of environmental impact statements. As to these projects the plaintiff has failed to demonstrate a sufficient probability of success when considered in connection with the relative equities of the parties to justify preliminary injunctive relief." (A300)

On May 24, 1974, on motion of the State defendants, PIN 9357.19 and PIN 9357.20, constituting the Oneonta Bypass, were released from the injunction, based upon the advanced state of completion, traffic safety factors and the large financial injury which the State would incur if not completed.

On January 28, 1976, again on motion of the State defendants, PIN 9357.00 and PIN 9357.01, which were the two final unfinished links between Binghamton and Oneonta, were freed of the injunctive restraints. These projects had been partially completed on November 14, 1973. Subsequently, an environmental impact statement (EIS) was prepared and circulated covering in detail the area from Binghamton to Oneonta and containing a comprehensive overview of the entire project.^{6/}

al approval was imminent when the motion was argued and, in fact, became final thirty days after publication by the President's Council on Environmental Quality (CEQ) on February 27, 1976, of a Notice of Availability of Final Environmental Impact Statement, in 41 Federal Register 8523.

Thus, by the end of January 1976, only those PINs in Group I were still subject to judicial restraint. These represented roughly the eastern one-half of I-88 from the easterly bounds of Oneonta, in Otsego County, through Schoharie County to an interchange on the New York State Thruway near Schenectady.

Though a substantial portion of the project between Binghamton and Oneonta was left free of the injunction initially, and the remainder of that portion was eventually released from the Court's constraints by three separate modification orders, plaintiffs never sought the appellate review available to them under 28 U.S.C. §1292(a)(1).

^{6/} This was prepared in consultation with the engineering firm of Tippetts, Abbott, McCarthy and Stratton of New York City, and was referred to throughout as the TAMS EIS.

D. THE PRESENT APPEAL

By motion dated April 16, 1977, the State defendants again moved to modify the injunction, this time with respect to PINs 9357.08-.17, from County Road 47 in Otsego County to the Schoharie-Schenectady County line, a distance of 44.3 miles. The bases for the motion were: the comprehensive overview contained in the Binghamton to Oneonta EIS prepared after imposition of the injunction (footnote 6, supra); the final combination EIS/\$4(f) Determination approved October 13, 1972;^{7/} the additional documentation establishing compliance with NEPA (42 U.S.C. §§4321, et seq.); with the hearing requirements of the Federal Aid Highway Act (23 U.S.C. §101, et seq.); with the §4(f) requirements of the Federal Aid Highway Act and the Department of Transportation Act [23 U.S.C. §138 and 49 U.S.C. §1653(f)]; with the Clean Air Amendments of 1970 (42 U.S.C. §1857, et seq.); and with the provisions of 33 U.S.C. relating to the need for Coast Guard bridge permits over navigable waters.

Upon the return date, June 28, 1976, at the suggestion of plaintiffs' counsel, the Court directed the defendants to include the pertinent documentation for PINs 1357.01-.04 (14.1 miles), the Schenectady portion, and PIN 9357.18 (2.5 miles), a connector section in Broome County between Port Crane and Interstate 81 (I-81),

^{7/} This was Exhibit 133, attached to the Memmott affidavit, in support of State defendants' original motion for summary judgment made in September 1972.

the only remaining PINs in Group I. A timetable for submission of this data was established with argument scheduled for September 1976.

On July 30, 1976, the State defendants presented the remaining available documentation that was complete at that time. This included a Final Supplemental EIS and §4(f) Statement for PINs 1357.01-.04 for which a CEQ Notice of Availability was published on June 25, 1976. Also provided were exhibits detailing compliance with all hearing requirements for these PINs (A441-A442) and a "non-navigability" determination from the Coast Guard relating to the Normans Kill Creek (A455).

Missing from the proffered exhibits were those items pertaining to PIN 9357.18, the I-88 Connector in Broome County, which lies between two completed sections of highway already open to the public. According to the July 27, 1976 affidavit of Commissioner Schuler (A444-A448), the completion of the federal EIS and hearing requirements were at least nine months away. Since this portion of the project has primarily localized ramifications and would not impair the overall utility of I-88 if not built, it is the subject of a separate EIS. The only effect, therefore, on the litigation at the present time is the continuation of the District Court's jurisdiction pending compliance by the defendants.^{8/}

^{8/} In fact, this has resulted in plaintiffs' having obtained a determination under FRCP, Rule 54(b), that would permit the appeal relating to the granting of partial summary judgment to proceed.

E. THE DECISION

Judge Port had three years earlier, in his November 14, 1973 Memorandum-Decision and Order, described the remaining issues as:

"... (a) whether environmental impact statements should be filed where they are not; (b) whether statements already filed are adequate; (c) whether the state or federal agency was the party preparing these statements;⁷⁵ (d) whether the segmental submission procedure impedes the environmental analysis function under NEPA;⁷⁶ and as to the issues involving hearings: (a) whether hearings should have been held where they have not been; (b) whether any promises or threats were made with regard to the withdrawal of requests for public hearings; and as to the issues involving parklands: (a) whether more Section 4 (f) Statements need to be prepared; (b) whether the Section 4 (f) statements that have been prepared are adequate to authorize a taking, under the statute, of parklands; and as to the issues involving navigability of the Susquehanna River, more facts must be put before the court so that it can determine whether the Susquehanna River is 'navigable' as a matter of law.⁷⁷" (Footnotes omitted.)

These, of course, pertained to the entire project as it existed in November 1973.

Under consideration, however, in September 1976 were, as noted, only those PINs still included within Group I of the 1973 Order, namely PINs 9357.08-.17 and PINs 1357.01-.04, but excluding PIN 9357.18.^{9/} At this juncture, the Court had before it voluminous documentation by way of affidavits and exhibits

^{9/} Any objections plaintiffs may have had regarding the defendants' compliance on the portion from Binghamton to Oneonta has, it seems, been waived by their failure to appeal from the three prior modifications of Judge Port's preliminary injunction (28 U.S.C. §1292[a][1]).

which established total compliance with each provision of federal law alleged in the complaint to have been violated. And, to the extent that Judge Port's 1973 description of the issues still pertained to these Group I PINs, every legal and factual objection had by this time been obviated.

Thus, the District Court properly, it is submitted, dissolved its prior injunction and granted summary judgment dismissing the complaint as to the PINs then before it.

It should be noted that the District Court included in its Order a self-imposed ten day stay to permit the plaintiffs to promptly appeal to this Court and to apply for a further stay. This was not done. In fact, the Notices of Appeal (A548-A551) were not filed until November 26, 1977 and November 29, 1977 (A4), practically at the outer limits of the time within which to appeal. ^{10/}

The State has now acquired a substantial portion of the right of way on PINs 9357.08-.12. There are presently under way construction contracts for PINs 9357.09, let January 13, 1977; for PIN 9357.10, let March 24, 1977; and for PIN 9357.11, let February 3, 1977.

^{10/} Any vestiges of the equitable doctrine of laches which still remain in environmental litigation should surely be applicable here [Steubing v. Brinegar, 511 F. 2d 489 (2nd Cir. 1975)], to the extent that reimposition of the preliminary injunction is now sought.

ARGUMENTPOINT I

BASED UPON THE EVIDENCE BEFORE
IT, THE DISTRICT COURT PROPERLY
DISSOLVED ITS PRIOR INJUNCTION.

Plaintiffs' appeals, as noted, are taken, inter alia, from the dissolution of a preliminary injunction originally imposed on November 14, 1973. As will be demonstrated, the documentation before the District Court amply supports the Court's action, since each of the issues identified by the Court in 1973, set forth at page 11, supra, have been eliminated. As also noted, these Court identified issues presently pertain only to the eastern one-half of the highway project.

A. WHETHER ENVIRONMENTAL IMPACT
STATEMENTS SHOULD BE FILED
WHERE THEY HAVE NOT BEEN

This is, at this juncture, a non-issue. While the defendants had initially relied upon the efficacy of "environmental reevaluations" for several of the PINs in the Binghamton to Oneonta portion of I-88, pursuant to then existing federal guidelines,^{11/} it is now clear that EIS's were required.

However, none of the "reevaluations" affected the eastern one-half of this project. In fact, at the time the injunction was imposed, there were approved EIS's for PINs 9357.08-.17

^{11/} See Steubing v. Brinegar, 511 F. 2d 489 (2nd Cir. 1975), at 493 (fn 6).

and PINs 1357.01-.07. Subsequently, the comprehensive TAMS EIS was approved as well as the supplemental EIS covering the Schenectady sections.

Unquestionably, EISs have been filed where they were not.

3. WHETHER STATEMENTS ALREADY
FILED ARE ADEQUATE

It is now well settled that the standard for reviewing the adequacy of an EIS is whether the agency's findings are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "without observance of procedure required by law." 5 U.S.C. §706(2)(A) and (D); New York v. Kleppe, ____ U.S. ____, 50 L. Ed. 2d 38 (1976); Kleppe v. Sierra Club, 427 U.S. 390 (1976); National Resources Defense Council v. Callaway, 524 F. 2d 79 (2nd Cir. 1975).

In New York v. Kleppe, supra, Mr. Justice Marshall, citing with approval this Court's explanation in National Resources Defense Council, supra, summed up the rule at 50 L. Ed. 2d 42, thusly:

"... Although we disagreed on certain issues, we were unanimous in concluding that the essential requirement of NEPA is that before an agency takes major action, it must have taken 'a "hard look" at environmental consequences.' Kleppe v. Sierra Club, supra, at n 21 (1976), quoting Natural Resources Defense Council v. Morton, 458 F.2d 827, 333

(DC Cir 1972). In evaluating the adequacy of environmental impact statements, the courts of appeals consistently have enforced this essential requirement, tempered by a practical 'rule of reason.'^{1/} As the Court of Appeals for the Second Circuit has explained:

"'[A]n EIS is required to furnish only such information as appears to be reasonably necessary under the circumstances for evaluation of the project rather than to be so all-encompassing in scope that the task of preparing it would become either fruitless or well nigh impossible.' Natural Resources Defense Council v. Callaway, 524 F2d 79, 83 (CA2 1975)." (Footnote omitted.)

Unquestionably, the EIS before Judge Port comported with this test. Each of the five areas required to be covered by NEPA, in 42 U.S.C. §4332(2)(C), are covered at length in each EIS.

As Judge Port correctly pointed out, the more recent EIS for Schenectady County took "a hard(er) look" than either the original Schenectady EIS or the Otsego-Schoharie Counties EIS. However, as he stated in his decision:

"... the fact that the statement as to the north-east terminus gets high grades doesn't mean that the other one didn't get a passing grade. A passing grade, as indicated by counsel for the federal defendants, is determined by the Court, not by agreement with the substance, but by whether or not they have complied with the law."

It is abundantly clear that plaintiffs' objections are concerned solely with the substance of the documents, not the procedures followed. While they may disagree with the conclusions drawn by the highway officials as to a particular alternative

route chosen, or as to a conclusion drawn regarding potential air, noise or water effects, neither the plaintiffs nor the Court may substitute their judgment for that of the administrators. As stated by the United States Supreme Court in Kleppe v. Sierra Club, 427 U.S. 390 (1976), at 410, fn 21:

"²¹ Neither the statute nor its legislative history contemplates that a court should substitute its judgment for that of the agency as to the environmental consequences of its actions. See Scenic Hudson Preservation Conference v. FPC, 453 F. 2d 463, 481 (CA2 1971), cert. denied, 407 U.S. 926 (1972). The only role for a court is to insure that the agency has taken a 'hard look' at environmental consequences; it cannot 'interject itself within the area of discretion of the executive as to the choice of the action to be taken.' Natural Resources Defense Council v. Morton, 148 U.S. App. D.C. 5, 16, 458 F. 2d 827, 838 (1972)."

Nothing, it is submitted, even remotely approaching arbitrary and/or capricious action, or abuse of discretion has been demonstrated. Moreover, every legal requirement incidental to the preparation and processing of these impact statements has been religiously followed. This aspect of the 1973 Order has, thus, been satisfied.

C. WHETHER THE STATE OR FEDERAL
AGENCY WAS THE PARTY PREPARING
THESE STATEMENTS

This issue, too, has become all but moot since Judge Port initially imposed his constraints, first by Congress' enactment of

Pub. L. 94-83, which added a new §4332(D) to 42 U.S.C., and second by the decision of this Court in Conservation Society of Southern Vermont, Inc. v. Secretary of Transportation, 531 F. 2d 637 (2nd Cir. 1976).

Before the District Court were affidavics and exhibits (A326-A343; A427-A439; A463-A471) establishing beyond doubt that the FHWA personnel "'maintained frequent contact' with state officials in the preparation of the EIS ..." (531 F. 2d 637, supra, 639). In fact, the complete description of Judge Oakes' findings, quoted in part above, could apply, as well, to this case.

Judge Port aptly summarized the situation (A540) when he said:

"The claim is made that there was inadequate federal participation and guidance. I have examined the papers. The papers have gone back and forth like a yo-yo. I can't come to that conclusion. I am led to just the opposite conclusion. The environmental impact statement for the north-east terminus filed extensive federal participation over a period of approximately five years. The federal and state officials met approximately once a month for about a year. I conclude that the federal officials have in fact provided the necessary guidance and participation contemplated by NEPA."

It is, thus, apparent that the District Judge was correct in concluding that the papers before him established adequate federal participation in the EIS preparation.^{12/}

^{12/} Mr. Kafin, in his brief at pages 24, 25 postulates that Pub. L. 94-83 "requires a searching factual inquiry." No such requirement has been found, but if it exists it has more than adequately been met.

D. WHETHER THE SEGMENTAL SUBMISSION
PROCEDURE IMPEDES THE ENVIRON-
MENTAL ANALYSIS FUNCTION UNDER NEPA

Subsequent to the imposition of the 1973 injunction, and in a good faith effort to comply with its terms, the defendants prepared the so-called TAMS EIS. As discussed earlier, this document addressed itself primarily to the PINs between Binghamton and Oneonta. It also contained a comprehensive overview of the entire project. This EIS was the predicate for dissolution of the injunction as to PINs 9357.00 and 9357.01, on January 28, 1976, from which no appeal was taken.

It is now well established that an EIS is required at the point when there is a proposed major federal action. Kleppe v. Sierra Club, 47 U.S. 390, 401 (1976); Aberdeen & Rockfish R. Co. v. SCRAP, 422 U.S. 289, 320 (1975) (SCRAP II). It would appear that in a highway case this point is reached when PS&E approval is sought by the State. Monroe County Conservation Council v. Volpe, 472 F. 2d 693 (2nd Cir. 1972).

It is obvious that on an Interstate highway project of 120 miles in length that not all parts will be progressed to the point of seeking PS&E approval at the same time. That is precisely the reason for breaking the route up into separate PINs and separate impact statements.

In view of that fact, and the United States Supreme Court decisions in Kleppe v. Sierra Club, supra, and the SCRAP II case,

supra, the segmentation argument, popular in 1972 when this litigation was commenced, has lost much of its vitality.

This Court, too, has apparently recognized the change. In Conservation Society of Southern Vermont, Inc. v. Secretary of Transportation, 531 F. 2d 637 (2nd Cir. 1976), there was a reversal of a prior requirement for a "corridor EIS", based upon, inter alia, the SCRAP II case, supra.

It is submitted that each of the EIS's filed in this case were prepared at the appropriate time. Segmentation is, therefore, not an issue in this litigation.

However, whether or not segmentation has survived as a bona fide issue since the time of Judge Port's decision in 1973, it has been eliminated from this lawsuit by the preparation and approval of the TAMS EIS containing a comprehensive overview. This is an acceptable and judicially recognized procedure under NEPA.

In fact, this Court has commented on the procedure, on at least two occasions, first in Natural Resources Defense Council, Inc. v. Callaway, 524 F. 2d 79 (2nd Cir. 1975) at pages 91, 92, and again in Natural Resources Defense Council, Inc. v. NRC, 539 F. 2d 824 (2nd Cir. 1976), at page 840, where this Court ^{13/} said:

"The argument that a bifurcated impact statement violates NEPA is foreclosed by the recent decision of this court in Natural Resources Defense Council, Inc. v. Callaway, 524 F.2d 79 (2d Cir. 1975).

^{13/} Petition for reargument was denied based on Kleppe, supra, on September 15, 1976, in 9 ERC 1414.

In that case Judge Mansfield, for the court, considered an impact statement which had been supplemented and concluded that

'the use of supplemental data and statements is permissible to bolster an otherwise deficient EIS or to amend an EIS to consider changes in the proposed federal action when the "supplemental" adequately remedies the deficiency or analyses the impact of the proposed change and is properly circulated among the appropriate agencies before a final decision has been reached.' (Id. at 91-92.)

"Other decisions have invited or required supplements to impact statements, and we are aware of no decision which has held that the agency must issue the impact statement all in one piece at one time; see Indian Lookout Alliance v. Volpe, 484 F.2d 11, 20 (8th Cir. 1973); Jicarilla Apache Tribe of Indians v. Morton, 471 F.2d 1275, 1280-81 (9th Cir. 1973); Natural Resources Defense Council, Inc. v. Morton, 148 U.S. App.D.C. 5, 458 F.2d 827, 837 (1972)."

And the United States Supreme Court, too, has expressly recognized the necessity for this procedure at times, in Kleppe v. Sierra Club, 427 U. S. 390 (1976), at pages 409 and 410, thusly:

"We begin by stating our general agreement with respondents' basic premise that §102(2)(C) may require a comprehensive impact statement in certain situations where several proposed actions are pending at the same time. NEPA announced a national policy of environmental protection and placed a responsibility upon the Federal Government to further specific environmental goals by 'all practicable means, consistent with other essential considerations of national policy.' NEPA §101(b), 42 U.S.C. §4331(b). Section 102(2)(C) is one of the 'action-forcing' provisions intended as a directive to 'all agencies to assure consideration of the environmental impact of their actions in decision-

making." Conference Report on NEPA, 115 Cong. Rec. 40416 (1969).¹⁸ By requiring an impact statement Congress intended to assure such consideration during the development of a proposal or--as in this case--during the formulation of a position on a proposal submitted by private parties.¹⁹ A comprehensive impact statement may be necessary in some cases for an agency to meet this duty. Thus, when several proposals are coal-related actions that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together.²⁰ Only through comprehensive consideration of pending proposals can the agency evaluate different courses of action.²¹ (Footnotes omitted.)

In view of these authorities, and given the varied stages of completion of this project when the injunction issued, the comprehensive overview was required and properly prepared "... to provide the cement or adhesive to hold the thing together" (A537).

Lastly, in this regard, it should be stressed that both segments here for which an EIS was prepared were of sufficient length to ensure the opportunity for consideration of alternatives, as required by NEPA, both connected logical termini, and both would have local utility. Conservation Society of Southern Vermont, Inc. v. Secretary of Transportation, 531 F. 2d 637 (2nd Cir. 1976); Daly v. Volpe, 514 F. 2d 1106 (9th Cir. 1975); Friends of the Earth v. Coleman, 513 F. 2d 295 (9th Cir. 1975).

Thus, irrespective of the comprehensive overview contained in the TAMS EIS, these segments could stand alone.

E. WHETHER HEARINGS SHOULD HAVE BEEN
HELD WHERE THEY HAVE NOT BEEN

The federal requirements for public hearings in connection with a federal aid highway project are found in 23 U.S.C. §128, and 23 C.F.R., Part 790. Basically, it is a two hearing procedure, calling for the availability of a "corridor public hearing" and a "design public hearing", the latter to be available after the general route location has been approved by FHWA. These requirements are met either by holding an actual hearing, or by publishing two notices of opportunity for public hearing and holding such hearing, if a written request is made (23 C.F.R. 790.5, §790.6, §790.7).

Judge Port's Memorandum-Decision and Order of November 14, 1973, chronicled the hearing status at that time, as follows:

"A. CORRIDOR HEARINGS HELD: ³⁶	PIN 1357.01-.04	(5/27/70)
B. OPPORTUNITY FOR CORRIDOR ³⁷ hearings provided;	PIN 9357.18 ^a	(9/69)
	PIN 9357.00-.07 ^b	(9/69)
	PIN 9357.08-.17	(9/69)
C. CORRIDOR HEARING NOT ³⁸ APPLICABLE:	PIN 9357.20 ^a	
	PIN 9357.19 ^b	
D. DESIGN HEARINGS HELD:	NONE.	
E. OPPORTUNITY FOR DESIGN ³⁹ HEARINGS PROVIDED:	PIN 9357.00 ^a	(6/70)
	PIN 9357.01 ^b	(6/70)
	PIN 9357.02 ^c	(9/69 & 11/70)
	PIN 9357.03 ^d	(11/70)
	PIN 9357.04 ^e	(11/70)
	PIN 9357.05 ^f	(11/70)
	PIN 9357.06 ^g	(3/71)
	PIN 9357.07 ^h	(3/71)
	PIN 9357.20 ⁱ	(3/66. 5/68 & 8/69)
	PIN 9357.19 ^j	(3/66, 5/68)

F. DESIGN HEARINGS PENDING:⁴⁰ PIN 9357.18^a
 PIN 9357.08 - .17^b
 PIN 1357.01 - .04^c "

(Footnotes omitted.)

In addition to the hearings noted at that time, separate FHWA design public approved hearings were held for PINs 9357.08-.11; for PINs 9357.12-.15; and for PINs 9357.16-.17. On PINs 1357.01-.04, an FHWA approved Supplemental Corridor public hearing was held and a combined corridor-design public hearing held in two sessions on two separate days (A334-A335, A441-A442). The minutes of each hearing were before the District Court.

Unquestionably, as Judge Port found,^{14/} "The required hearings, have all been held."

F. WHETHER MORE SECTION 4(f) STATEMENTS
 NEED TO BE PREPARED AND WHETHER THE
 SECTION 4(f) STATEMENTS THAT HAVE
 BEEN PREPARED ARE ADEQUATE TO AUTHORIZE
 A TAKING, UNDER THE STATUTE, OF
PARKLANDS

The necessity for a §4(f) statement arises under Pub. L. 89-670, §4(c), the Department of Transportation Act, 49 U.S.C. §1653(f), which provides:

" . . . After August 23, 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl

^{14/} Plaintiffs initially complained that the State DOT personnel had pressured individuals into withdrawing requests for hearings. This was, of course, not so. However, only one such request and withdrawal occurred on the eastern one-half. Hearings were ultimately held. This is explained fully in the affidavit of Commissioner Schuler (A334) and is not rebutted [FRCP, Rule 56(e)].

refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use."

The identical language is contained in Pub. L. 89-574, the Federal Aid Highway Act, 23 U.S.C. §138.

As the Court below correctly noted (A542), the sole involvement with a §4(f) situation requiring a taking was concerned with .14⁺ acre from a park in Richmondville. The §4(f) Statement prepared for this segment eventually was included in the EIS for Otsego and Schoharie Counties. Included therein was the required determination of no local significance. Ultimately, by letter of January 5, 1973 (A343), the Secretary of Transportation determined that the taking was necessary under the above-quoted section.

Included with the Schenectady EIS, but not mentioned by Judge Port, was a §4(f) Statement, though this was not concerned with parklands, but rather with private areas of historical significance (A441, Appendix "B"). It, too, was approved by the Secretary on June 11, 1976 (A471, page 43).

The standard of review for a §4(f) Statement as established in Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 413-416

(1971), is that of Administrative Procedure Act, 5 U.S.C. §706(2) (A), whether the Secretary's determination is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

The defendants' documentation establishes compliance with this standard. Nothing in plaintiffs' submissions rebut it. For that matter, nothing of substance factually was even addressed to these determinations.

Substantively, then, as well as procedurally, every §4(f) requirement has been met.

G. WHETHER THE SUSQUEHANNA RIVER
IS NAVIGABLE AS A MATTER
OF LAW

At the time that the State defendants initially moved the District Court for summary judgment in 1972, the Susquehanna River was not classified as a navigable water of the United States. Accordingly, the position was taken that no federal permits were necessary for any part of I-88 (A2, Memmott affidavit, Exhibit 129). In fact, and as Judge Port concluded, the Coast Guard had classified the river as navigable only to Mile 273.5, above Athens, Pennsylvania.

Since that time, however, both the Coast Guard and the Army Corps of Engineers have redefined their definition of navigable waters to include many areas previously free of their control.

The current procedure calls for a navigability determination by the Coast Guard upon request of DOT. If determined to be navigable, then permits would be required. It may also be necessary to obtain Corps of Engineer permits. These possible permits relate specifically to the design of the structure spanning the water course and/or construction activity in the waterway, not to the desirability or permissibility of constructing such structures. Application therefor cannot be made until after approval of an EIS, after design approval by FHWA and after completion of the detailed design of the specific structure affecting the watercourse.^{15/}

In short, at this juncture it is not known whether permits from either the Coast Guard or Army Corps of Engineers will be required.

In any case, irrespective of the legal question of navigability of the Susquehanna River, Commissioner Schuler has stated that:

"... If, in fact, the United States Coast Guard and/or the Corps of Engineers determines that specific permits are required for the structure relating to the Susquehanna River, all necessary permits will be applied for and obtained at the proper time. No work affecting the Susquehanna will be commenced without obtaining Coast Guard and Corps of Engineers permits if such are necessary." (A336-A337)

^{15/} As a practical matter, FHWA has taken the position that PS&E approval may not be granted, pursuant to Monroe County Conservation Council, Inc. v. Volpe, 472 F. 2d 693 (2nd Cir. 1972), absent either permits or a negative navigability determination.

It has, thus, been demonstrated that every issue identified by the District Court when it issued its 1973 injunction has either been eliminated by compliance or rendered moot by subsequent ^{16/} circumstances.

^{16/} Judge Port apparently did not consider the allegation of improper Federal Interstate Highway (FISH) designation to be an issue of substance in 1973. It is similarly treated as a non-issue in the current decision, as it should be, the Court's having pointed out the plaintiffs' failure to follow up this point for almost four years. In any case, nothing to evidence any arbitrary or capricious act, any abuse of discretion, or any act contrary to law [5 U.S.C. §706(2)(A)], was before the Court [Lathan v. Brinegar, 506 F. 2d 677 (9th Cir. 1974)].

POINT II

BASED UPON THE EVIDENCE BEFORE
IT, THE DISTRICT COURT PROPERLY
GRANTED PARTIAL SUMMARY JUDGMENT
TO DEFENDANTS.

Both plaintiffs' briefs echo the words of this Court in Monroe County Conservation Council, Inc. v. Volpe, 472 F. 2d 693, 700 (2nd Cir. 1972), where it was stated in the context of that case "... summary judgment was an unusually inappropriate vehicle for determination of the issues."

It is submitted that Monroe County, supra, is not controlling on that point, if it were a point, for at least two ^{17/} reasons.

First, the statement was obviously directed to the facts in that case. The entire quote reads:

"Therefore the district court must make 'a thorough, probing, in-depth review' to be assured that the Secretary, in approving the taking of parkland, has acted properly, Overton Park, supra, at 415, 91 S.Ct. 814. It is abundantly clear that such a review was not undertaken in this case, and under the circumstances, summary judgment was an unusually inappropriate vehicle for determination of the issues." (Emphasis added.)

It clearly was not intended as an all encompassing rule of law in environmental cases.

In fact, as recently as February of this year, this Court discussed at length whether the standard of review on an

^{17/} It is now clear that summary judgment was inappropriate there, since the FHWA was about to grant PS&E approval through a park after the effective date of NEPA without either an EIS or a §4(f) Statement.

appeal from the grant or denial of a preliminary injunction in an environmental lawsuit is stricter "... when the district court's decision was based not on any testimonial evidence but rather solely on a written record consisting of pleadings, depositions, affidavits and other documents." New York v. NRC, ____ F. 2d ____, 9 ERC 1825, 1830 (2nd Cir. February 14, 1977).

Illuminating, too, in this regard is Kleppe v. Sierra Club, 427 U. S. 390, 395 (1976), in which the United States Supreme Court reversed the Court of Appeals for the District of Columbia and upheld the District Court's granting of summary judgment dismissing the complaint. There is, it seems, tacit approval of this procedure, at the very minimum.

Second, unlike the meager factual situation before Judge Burke in Monroe County, supra, the record before Judge Port was extensive, covering every minute aspect of the highway process. This case was, therefore, particularly appropriate for the granting of summary judgment.

While it certainly would be possible to undergo an evidentiary hearing involving the issues presently in this lawsuit, no useful purpose would be served thereby. The testimony would be entirely repetitive and cumulative, except for facts arising since the original submissions.

Moreover, plaintiffs have apparently lost sight of the standard of review discussed earlier. The determination under review here need not necessarily agree with the conclusions

that plaintiffs have drawn or that some other highway administrator might reach, for that matter. The determinations need only be reasonable.

Lastly, again apparently lost sight of by plaintiffs, is FRCP, Rule 56(e), which provides in pertinent part:

"When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

Plaintiffs simply did not controvert the factual presentation made in this case in the District Court. There was, in fact, no genuine issue of any nature to be tried.

Accordingly, Judge Port quite properly granted partial summary judgment to the defendants on the matters then before him.

CONCLUSION

THE ORDER OF THE DISTRICT COURT
SHOULD BE AFFIRMED.

Dated: May 6, 1977

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Attorney for State Defendants-
Appellees

RUTH KESSLER TOCH
Solicitor General
DOUGLAS S. DALES, JR.
Assistant Attorney General
of Counsel

AFFIDAVIT OF SERVICE

Capital Region Citizens Committee, et al.,
Plaintiffs-Appellants,

-against-

John A. Volpe, et al.,
Defendants-Appellees.

STATE OF NEW YORK)
COUNTY OF ALBANY) ss.:
CITY OF ALBANY)

Robert Ornoski, being duly sworn, says:

I am over eighteen years of age and an employee
in the office of the Attorney General of the State of New York, attorney
for the defendants-appellees herein.

On the 12th day of May 1977 I served
the annexed brief upon the
attorneys named below, by depositing two copies thereof,
properly enclosed in a sealed, postpaid wrapper, in the letter box
of the Capitol Station post office in the City of Albany, New York,
a depository under the exclusive care and custody of the United States
Post Office Department, directed to the said attorneys at the
addresses within the State respectively theretofore designated by
them for that purpose as follows:

Jack R. Lebowitz
115 Maple St
Glens Falls, NY 12801

Hon. Peter R. Taft
Dept. of Justice
Washington, DC 20530

William Hoppen
Ardsley-on-Hudson
New York 10503

Paul V. French
U.S. Court House
& Post Office
Albany, NY 12201

Sworn to before me this

13th day of May 1977

Robert Ornoski

Ralph D. Camardo

RALPH D. CAMARDO
Notary Public, State of New York
No. 4618149
Qualified in Albany County
Commission Expires March 30, 1979